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Intervention in the Tax Court and the Appellate Review of Tax Court Procedural Decisions

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INTERVENTION IN THE TAX COURT AND THE APPELLATE REVIEW OF TAX COURT PROCEDURAL DECISIONS

Huff v. Commissioner, 743 F.3d 790 (11th Cir. 2014)

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Christopher Weeg^{**}

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INTRODUCTION

The Tax Court is an Article I court.¹ It resolves more than 95% of all tax-related litigation²—actually nearly 97% of the total federal tax docket in 2012.³ Despite this substantial role in federal litigation, scholars and courts have generally put aside the issue of what standard is appropriate when a U.S. federal court of appeals reviews Tax Court procedural questions. Section 7482 of the Internal Revenue Code (I.R.C.) grants jurisdiction to the courts of appeals to review Tax Court decisions “in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.”⁴ Unlike district courts, which must follow the Federal Rules of Civil Procedure (FRCP), the Tax Court operates under its own separate set of procedural rules—the Tax Court Rules of Practice and Procedure (Tax Court Rules). Congress explicitly authorized the Tax Court to choose its own procedural rules under I.R.C. § 7453.⁵

Where there is no applicable Tax Court procedural rule, Tax Court Rule 1(b) provides that the Tax Court “may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand.”⁶ Currently, no judicial decision analyzes the appropriate standard for appellate review of a Tax Court’s decision to apply (or not apply) a federal procedural rule where the Tax Court lacks its own applicable procedure.

The appropriate standard of appellate review for Tax Court procedural decisions garnered attention when the U.S. Virgin Islands (USVI) recently sought to intervene in several Tax Court proceedings under FRCP 24(a)(2).⁷ The Tax Court Rules lack an intervention procedure and the Tax Court, acting pursuant to its discretion under Rule 1(b), has never granted a third party non-taxpayer’s motion to intervene under FRCP 24(a)(2).⁸ Given the outcome-determinative potential of the standard of

1. I.R.C. § 7441 (2012) (establishing, “under [A]rticle I of the Constitution of the United States, a court of record to be known as the United States Tax Court.”). In 1924, Congress created the Tax Court’s predecessor, the Board of Tax Appeals, as an independent agency of the executive branch. David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 22. In 1969, Congress established the Tax Court as a specialized legislative court under Article I of the Constitution. *Id.*

2. Laro, *supra* note 1, at 18.

3. Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1836 n.1 (2014).

4. I.R.C. § 7482(a)(1).

5. I.R.C. § 7453.

6. TAX CT. R. 1(b).

7. *See infra* Part II.

8. *See* *Appleton v. Comm’r (Appleton I)*, 135 T.C. 461, 466 (2010).

review,⁹ these recent USVI cases—discussed individually below—provide an important opportunity to determine whether the abuse of discretion or de novo standard should govern appellate review of Tax Court procedural decisions.

In 2014, the U.S. Court of Appeals for the Eleventh Circuit became the third federal appellate court to overturn a Tax Court decision denying a motion by the USVI to intervene in a dispute between the Internal Revenue Service (IRS) and a taxpayer. In *Huff v. Commissioner*,¹⁰ the Eleventh Circuit joined the U.S. Courts of Appeals for the Third and Eighth Circuits in allowing the USVI to intervene in a Tax Court proceeding.¹¹ However, not all federal appellate courts have ruled this way. The U.S. Court of Appeals for the Fourth Circuit created a circuit split when it affirmed the Tax Court in denying intervention to the USVI.¹²

The *Huff* decision deepened the current circuit split and complicated the matter further. The Eleventh Circuit in *Huff*—unlike the other three circuits that have addressed this issue—allowed intervention as a matter of right under FRCP 24(a)(2).¹³ This approach is novel, as the Tax Court has never allowed a third party non-taxpayer to intervene under this provision—although it has the discretion to do so under Tax Court Rule 1(b).¹⁴

The *Huff* decision presents two issues worthy of discussion in this Comment. The first is whether de novo review is appropriate when a court of appeals reviews Tax Court procedural decisions. Generally, under I.R.C. § 7482, the appeals courts review Tax Court decisions “in the same manner and to the same extent” as district court decisions.¹⁵ Yet, given the Tax Court’s general power to prescribe its own procedural rules

9. One study found that “deferential standards of review make reversals less likely relative to other outcomes.” Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 24, 25 (examining case law, determining affirmation and reversal rates, and documenting the standard of review applied in those cases); see also Stephen E. Ludovici, *Rule 60(b)(4): When the Courts of Limited Jurisdiction Yield to Finality*, 66 FLA. L. REV. 881, 898 (2014) (noting that an abuse of discretion standard provides an “insulating level of discretion” to protect lower court judgments).

10. 743 F.3d 790 (11th Cir. 2014).

11. *Id.* at 792; *Appleton v. Comm’r*, 430 F. App’x 135, 136 (3d Cir. 2011); *Coffey v. Comm’r*, 663 F.3d 947, 949 (8th Cir. 2011).

12. *McHenry v. Comm’r*, 677 F.3d 214, 216 (4th Cir. 2012).

13. *Huff*, 743 F.3d at 801.

14. *Id.*

15. I.R.C. § 7482(a)(1) (2012); see Lederman, *supra* note 3, at 1838 (examining whether “the courts of appeals treat Tax Court decisions the same as those of district courts in tax cases—reviewing legal questions de novo and factual questions under a ‘clearly erroneous’ standard—or [whether] they [should] apply a more deferential standard analogous to review of agency decisions”).

under I.R.C. § 7453,¹⁶ the *Huff* court erred in applying the de novo standard of review to the Tax Court's decision to not apply FRCP 24(a)(2).

The second issue the *Huff* opinion presents—regarding the substance of the case—is whether the USVI has a right to intervene under FRCP 24(a)(2). This issue turns on whether a Tax Court proceeding is the proper forum in which to confront the weighty concerns of fair implementation and coordination of two separate but interrelated taxing agencies—the IRS and the USVI's Bureau of Internal Revenue (BIR).

Part I of this Comment briefly summarizes the pertinent facts of *Huff*. Part II surveys the current circuit split on intervention in Tax Court proceedings. Part III analyzes the proper standard for review of the USVI's motion to intervene under FRCP 24(a)(2), as well as the proper standard regarding all appellate review of Tax Court procedural decisions—a discussion that is largely absent from both scholarly works and court opinions. This Comment concludes in Part III with a critique of the *Huff* court's FRCP 24(a)(2) analysis.

I. *HUFF V. COMMISSIONER*

The facts in *Huff* are similar to those of the other cases on both sides of the circuit split: (1) a taxpayer filed returns with the BIR pursuant to I.R.C. § 932; (2) more than three years after the filing, the IRS issued a notice of deficiency in which it challenged the taxpayer's status as a bona fide USVI resident; (3) the taxpayer challenged the notice in Tax Court as time barred under I.R.C. § 6501; and (4) the USVI filed a motion to intervene in the proceeding.

In *Huff*, the taxpayers, claiming to be USVI residents, filed their tax returns with the BIR for tax years 2002–2004.¹⁷ Under I.R.C. § 932, bona fide residents of the USVI do not have to file returns with the IRS or pay income taxes to the United States as long as they file returns with the BIR and properly report their worldwide income.¹⁸ In 2009 and 2010, the IRS issued the taxpayers notices of deficiency, claiming the taxpayers were not residents of the USVI during the years in question and therefore should have filed returns with the IRS and paid taxes on their U.S. source income.¹⁹ The IRS further claimed that I.R.C. § 6501's three-year statute of limitations period for collections efforts had not begun because the

16. The I.R.C. provides that “the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe.” I.R.C. § 7453.

17. *Huff*, 743 F.3d at 793.

18. See I.R.C. § 932(c).

19. *Huff*, 743 F.3d at 793.

taxpayers never filed returns with the IRS.²⁰ The taxpayers then filed petitions with the Tax Court and argued that the notices were time barred (and, in the alternative, incorrect), and the USVI moved to intervene.²¹ The Tax Court denied the motion for intervention, and the USVI appealed to the Eleventh Circuit.²²

II. THE CIRCUIT SPLIT: REVIEWING THE VIRGIN ISLANDS' FRCP 24 MOTIONS

The Third, Eighth, and, most recently, the Eleventh Circuit Courts of Appeals have all reversed the Tax Court and allowed the USVI to intervene. The Fourth Circuit stands alone in affirming the Tax Court's denial of the USVI's motion to intervene. As discussed below, these courts have taken different routes in reaching their decisions. As a result of this split, the USVI's right to intervene may simply depend on the region in which the taxpayer is located.

A. *The Underlying Tax Court Decision*

The Tax Court first addressed the issue of the USVI's intervention in a deficiency proceeding in *Appleton v. Commissioner (Appleton I)*.²³ Like in *Huff*, the taxpayer in *Appleton I* claimed the gross income exclusion under § I.R.C. 932(c) and thereby filed and paid taxes only to the BIR.²⁴ The IRS then issued notices of deficiency asserting that the taxpayer was not a bona fide USVI resident and therefore did not qualify for the gross income exclusion under I.R.C. § 932.²⁵ The taxpayer challenged these notices by filing a petition with the Tax Court arguing that I.R.C. § 6501's three-year statute of limitations barred any IRS deficiency claim.²⁶

The USVI filed a motion to intervene in order to raise the same statute of limitations issue under I.R.C. § 6501.²⁷ Although the taxpayer and USVI's legal positions were aligned, the USVI sought intervention "for the purpose of protecting its rights and interests," claiming the IRS's position "threaten[ed] [its] taxing autonomy and fiscal sovereignty and significantly impair[ed] the BIR's ability to administer the tax law of the Virgin Islands."²⁸ Accordingly, the USVI moved to intervene under

20. *Id.* Under I.R.C. § 6501, the IRS generally has three years from the date of filing to assess additional taxes owed. I.R.C. § 6501(a).

21. *Huff*, 743 F.3d at 794.

22. *Id.*

23. 135 T.C. 461 (2010).

24. *Id.* at 462, 464.

25. *Id.*

26. *Id.* at 465.

27. *Id.* at 465–66.

28. *Id.* at 465.

FRCP 24(a)(2) (Intervention of Right) and FRCP 24(b)(2) (Permissive Intervention).²⁹

The Tax Court denied both intervention of right and permissive intervention.³⁰ Regarding intervention of right, the Tax Court reasoned that the USVI's purely economic interest in the outcome of the litigation—avoiding the purported negative effects on the USVI's business climate by the IRS's collection activities—did not meet “the direct, substantial, and legally protectable requirements” that FRCP 24(a)(2) demands.³¹ Furthermore, the Tax Court determined that the IRS's efforts would “not undermine [the USVI's] taxing authority or discourage legitimate economic development.”³²

The Tax Court side-stepped the issue of whether FRCP 24(a)(2) may be invoked in Tax Court proceedings by stating that “[b]ecause we find that movant has not satisfied the requirements of [FRCP] 24(a)(2), we need not and do not decide herein whether [FRCP] 24(a)(2) applies to proceedings in this court.”³³

The Tax Court denied permissive intervention under FRCP 24(b)(2) because the USVI had “neither demonstrated that its participation as a party is *necessary* to advocate for an unaddressed issue nor shown that its intervention *will not delay* the resolution of this matter.”³⁴ In reaching this conclusion, the Tax Court observed that the taxpayer, who was represented by counsel, had already raised the statute of limitations issue and in fact had made it a “cornerstone of his case.”³⁵ As such, the Tax Court reasoned that the USVI's participation would only “introduce redundancy into the proceedings,”³⁶ and if allowed to intervene, its participation “could result in trial complications as well as delay the

29. *Id.* at 466. Under intervention of right, the court “must permit” intervention by any party that “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P. 24(a)(2). Under permissive intervention, the court “may permit” intervention by a governmental officer or agency if the claim is based on a statute or regulation administered by the officer or agency. FED. R. CIV. P. 24(b)(2). The USVI indicated that, if allowed to intervene, it would file a motion for summary judgment asserting the IRS was time barred under I.R.C. § 6501, which was also the foundation of the taxpayer’s argument. *Appleton I*, 135 T.C. at 466.

30. *Appleton I*, 135 T.C. at 471.

31. *Id.* at 467–68.

32. *Id.* at 468.

33. *Id.* at 466–67.

34. *Id.* at 469 (emphasis added).

35. *Id.* at 470.

36. *Id.*

resolution of the [statute of limitations] issue.”³⁷ In lieu of intervention, the Tax Court granted the USVI the right to file an amicus brief to advance its interest in the outcome of the proceeding.³⁸

B. *The Third and Eighth Circuits*

On appeal, the Third Circuit in *Appleton v. Commissioner (Appleton II)*³⁹—an unpublished decision—held that the Tax Court abused its discretion by denying the USVI’s motion because it applied the incorrect standard when considering permissive intervention under FRCP 24(b)(2).⁴⁰ Since the Third Circuit granted the USVI permissive intervention, the appellate court did not reach the issue of intervention of right under FRCP 24(a)(2).⁴¹

In response to *Appleton II*, the IRS published an Action on Decision stating that it would “not follow the Third Circuit’s nonprecedential opinion in *Appleton [II]* in any pending or future litigation.”⁴² Then the Eighth Circuit, in *Coffey v. Commissioner*,⁴³ followed the Third Circuit in holding that the Tax Court applied the incorrect legal standard to the USVI’s motion for permissive intervention.⁴⁴ Like the Third Circuit, the Eighth Circuit did not reach the issue of intervention of right under FRCP 24(a)(2).⁴⁵

C. *The Fourth Circuit*

The Fourth Circuit, in *McHenry v. Commissioner*,⁴⁶ declined to follow the Third and Eighth Circuits and instead sided with the Tax Court.⁴⁷ In

37. *Id.* at 470–71. Through its participation in the proceeding, the USVI would “have the right to introduce documentary evidence, call its own witnesses, and cross-examine witnesses of the other parties.” *Id.* at 470.

38. *Id.* at 471.

39. 430 F. Appx. 135 (3d Cir. 2011).

40. *Id.* at 136, 138. The Third Circuit took issue with the Tax Court’s conclusion that the USVI had not demonstrated that its participation was “necessary,” nor shown that its intervention “will not delay” the resolution of this matter. *Id.* at 136, 137–38. The Court reasoned that the above standard was improper because FRCP 24(b) requires the court to consider “whether this intervention will cause ‘undue delay,’ or ‘prejudice the adjudication of the original parties rights.’” *Id.* at 138 (emphasis added) (quoting FED. R. CIV. P. 24(b)(3)).

41. *Id.* at 137.

42. IRS, OFFICE OF CHIEF COUNSEL, IRB No. 2011–47, ACTION ON DECISION (Nov. 21, 2011).

43. 663 F.3d 947 (8th Cir. 2011).

44. *Id.* at 951. “As the Third Circuit said, whether the proposed intervenor’s participation is ‘necessary to advocate for an unaddressed issue’ is not the correct standard.” *Id.* (quoting *Appleton II*, 430 F. Appx. at 138).

45. *See id.* at 952 n.3.

46. 677 F.3d 214 (4th Cir. 2012).

47. *Id.* at 216. In *McHenry*, the IRS issued the taxpayer notices of deficiency for failing to file returns with the IRS based on the agency’s determination that the taxpayer was not a bona

contrast to the Third and Eighth Circuits, the Fourth Circuit reached the issue of intervention of right and, in affirming the denial of intervention, noted its “great” deference to the Tax Court:

Because Tax Court Rule 1(b) gives the Tax Court broad discretion in deciding whether and to what extent to follow Federal Rule of Civil Procedure 24 governing intervention and because Civil Rule 24 itself confers broad discretion on a trial court, we give great deference to a Tax Court’s decision to deny intervention, reviewing only for a *clear* abuse of discretion.⁴⁸

The Fourth Circuit noted the USVI’s uphill battle for intervention under FRCP 24(a)(2), acknowledging that the Tax Court has never authorized a non-taxpayer third party to intervene as of right in a tax deficiency proceeding.⁴⁹ The court explained that the USVI would have to “demonstrate the error in the Tax Court’s observation that a non-taxpayer, governmental entity may never have a ‘right’ to intervene in a tax deficiency proceeding in the Tax Court.”⁵⁰ Furthermore, the Fourth Circuit stated that it was not “authorized to mandate Tax Court procedure to govern intervention of right even if [the appellate courts] thought it would be useful” as that power “is left exclusively to the Tax Court” pursuant to I.R.C. § 7453.⁵¹

fide resident of the USVI pursuant to I.R.C. § 932. *Id.* at 216–17. The taxpayer challenged the notices in the Tax Court and the USVI moved to intervene, arguing for intervention of right under FRCP 24(a)(2) and permissive intervention under 24(b)(2). *Id.* at 217.

48. *Id.* at 216. As already noted, Tax Court Rule 1(b) provides “the Court or the Judge before whom the matter is pending *may* prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure *to the extent that they are suitably adaptable* to govern the matter at hand.” TAX CT. R. 1(b) (emphasis added).

49. *Id.* at 226. The Tax Court has authorized a spouse of a taxpayer to intervene as a matter of right under FRCP 24(a)(1), which provides that a court must grant intervention to a party “who is given an unconditional right to intervene by a federal statute.” FED. R. CIV. P. 24(a)(1); *see, e.g.*, *Christie v. Comm’r*, No. 24515-12S, 2014 WL 1243973, at *1 (T.C. Mar. 26, 2014) (“Section 6015(e)(4) confers on a nonelecting spouse an unconditional statutory right to intervene within the meaning of rule 24(a)(1) of the Federal Rules of Civil Procedure.”).

50. *McHenry*, 677 F.3d at 226. Though the USVI did not challenge the Tax Court’s use of discretion in denying intervention under FRCP 24(a)(2), the court noted that if it had “attempted to demonstrate an abuse of discretion, it would be faced with the Tax Court’s own perception of its limited jurisdiction” under I.R.C. § 6213(a). *Id.*; *see also* *Cincinnati Transit Inc. v. Comm’r*, 55 T.C. 879, 882 (1971), *aff’d*, 455 F.2d 220 (6th Cir. 1972) (“A perusal of the various sections of the Internal Revenue Code dealing with appeals to the Tax Court and procedures in the Tax Court make it very clear that the provisions of the Code contemplate that redetermination of deficiencies in a particular case are to be made only upon a petition filed by the taxpayer whose taxes are involved or his duly authorized representative . . .”).

51. *McHenry*, 677 F.3d at 226; I.R.C. § 7453 (2012) (stating “the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe”). Even assuming FRCP 24(a)(2)

D. *The Eleventh Circuit*

The Eleventh Circuit—unlike the other circuits—did not reach the issue of permissive intervention under FRCP 24(b)(2) and instead decided that FRCP 24(a)(2) *does* apply in Tax Court proceedings.⁵² In reversing the Tax Court, the Eleventh Circuit in *Huff* applied the de novo standard of review to the Tax Court’s denial of intervention of right.⁵³ To decide if the USVI could intervene under FRCP 24(a)(2), the *Huff* Court considered the following: (1) whether the USVI had any “interests in the Tax Court proceedings”; (2) whether those “interests would be practically affected by the Virgin Islands’ exclusion”; and (3) whether the taxpayers would “adequately represent[]” the USVI’s interests.⁵⁴

The *Huff* court determined that the USVI had two interests in the Tax Court proceeding. First, it found that the USVI had an “interest[] in the disputed tax revenue” at issue in the deficiency proceeding given the “practical implications for the Virgin Island’s taxation of the same individuals.”⁵⁵ Second, the court found that the USVI also had a “sovereign interest” in the Tax Court proceeding because “the IRS’s ability to issue deficiency notices to Virgin Islands taxpayers beyond § 6501’s three-year period implicates the Virgin Islands’ interest in preserving the integrity of its tax system.”⁵⁶ The court reasoned that “[t]his type of sovereign interest is precisely the type of legally protectable interest that has long formed the basis for intervention under Rule 24(a)(2).”⁵⁷

The Eleventh Circuit then addressed whether these interests would be impaired by a denial of intervention, and if so, whether the original parties to the proceeding would adequately represent the USVI’s interests.⁵⁸ The court noted that FRCP 24(a)(2) merely requires a showing “that the would-be intervener be practically disadvantaged by his exclusion from the proceedings.”⁵⁹ The court concluded that the USVI met this low bar because an adverse ruling “will affect the Virgin Islands’ ability to

applied to the proceeding, the Fourth Circuit agreed with the Tax Court’s conclusion “that the Virgin Islands cannot demonstrate that resolution of [the taxpayer’s] statute of limitations defense will impede the Virgin Islands’ ability to protect its interests.” *McHenry*, 677 F.3d at 226–27. The *McHenry* court found the outcome of the case would not impede the USVI’s ability to administer its own tax laws, and its views on the proper application of the I.R.C. could be expressed in an amicus brief as permitted by the Tax Court. *Id.* at 227.

52. *Huff v. Comm’r*, 743 F.3d 790, 801–02 (11th Cir. 2014).

53. *Id.* at 795.

54. *Id.* at 796.

55. *Id.* at 798–99.

56. *Id.* at 799.

57. *Id.*

58. *Id.* at 800.

59. *Id.*

independently administer its tax system and will impact its claim to the tax revenue it received from these Taxpayers.”⁶⁰ Ultimately, the circuit court held that “the Taxpayers’ pecuniary interest is qualitatively different from the Virgin Islands’ sovereign interests in the administration of its tax system,” and thus the USVI’s interests in the proceedings were not adequately represented in the proceeding.⁶¹

Going further than its sister circuits, the *Huff* court held that FRCP 24(a)(2) does apply in Tax Court proceedings.⁶² While the Eleventh Circuit acknowledged that the Tax Court Rules do not provide rules for intervention of right, the court noted that Rule 1(b) permits the application of the Federal Rules of Civil Procedure when necessary and also that Rule 1(d) mandates that “[t]he Court’s Rules shall be construed to secure the just . . . determination of every case.”⁶³ The Eleventh Circuit concluded that “[g]iven the thrust of the Tax Court Rules,” the “novelty [of applying FRCP 24(a)(2) to a Tax Court proceeding fails as] a sufficient justification to deny the Virgin Islands the benefit of Rule 24(a)(2).”⁶⁴

III. ANALYSIS OF *HUFF*

The *Huff* court made two errors. First, by ignoring I.R.C. § 7453 and glossing over Tax Court Rule 1(b), *Huff* applied the wrong standard of review to the Tax Court’s *discretionary* decision to not apply FRCP 24(a)(2) in its own proceeding. Second, even under a *de novo* standard of review, the appellate court should not have allowed the USVI to intervene in a limited Tax Court deficiency proceeding in order to wage its private war against the IRS.

A. *The Huff Court Applied the Wrong Standard of Review*

Unlike the Third and Eighth Circuits, the Eleventh Circuit allowed the USVI to intervene in a Tax Court proceeding under intervention of right rather than permissive intervention.⁶⁵ Yet, when it reversed the Tax

60. *Id.*

61. *Id.* at 800–01. The court bolstered its inadequate-representation finding by pointing to the different “capabilities” of the taxpayers due to their lack of “the same institutional knowledge of the interrelationship between the United States and Virgin Islands tax systems . . . [and] access to the same information regarding the consequences of the IRS’s statute-of-limitations position.” *Id.* at 800.

62. *Id.* at 801.

63. *Id.* (alteration in original) (quoting TAX CT. R. 1(d)). Tax Court Rule 1(d) in its entirety reads, “The Court’s Rules shall be construed to secure the just, *speedy*, and *inexpensive* determination of every case.” TAX CT. R. 1(d) (emphasis added).

64. *Huff*, 743 F.3d at 801.

65. *See supra* note 52 and accompanying text.

Court's denial of intervention of right, the *Huff* court erred by applying the de novo standard of review.⁶⁶ This de novo standard is at odds with the Fourth Circuit's decision to review the Tax Court's denial of intervention for an abuse of discretion in *McHenry*.⁶⁷ While the *Huff* court was correct that the Eleventh Circuit "review[s] a trial court's denial of intervention of right *de novo*,"⁶⁸ its error in choosing the de novo review standard stems from the interplay of the following elements: (1) the Tax Court's decision in *Appleton I* to "reserve[] the question of whether Rule 24(a)(2) applies in Tax Court in the first place";⁶⁹ (2) the Tax Court's discretion to implement its own procedure pursuant to Tax Court Rule 1(b) and I.R.C. § 7453; and (3) the general effect of I.R.C. § 7482 on appellate review of Tax Court rulings.

66. See *Huff*, 743 F.3d at 795.

67. In 1988, the Supreme Court in *Pierce v. Underwood* settled a circuit split over the correct standard of review regarding a "substantial justification" issue. 487 U.S. 552, 557–63 (1988). The *Pierce* Court articulated the problem of choosing the proper standard of review as follows:

For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. For most others, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer.

Id. at 558 (citations omitted). As framed by Professor Martha Davis, the Court developed the following "'significant relevant factors' to weigh in favor of or against deferential review":

(1) implicit statutory direction, even when language does not compel deference or is not perfectly clear; (2) provision for deferential review in analogous determinations under the statute; (3) the judicial actor who, as a "matter of the sound administration of justice," is "better positioned than another to decide the issue"; (4) whether it is impracticable to formulate a rule of decision for the issue, because the problem is multifarious, novel, fleeting, and resists generalization for now; and (5) the substantial consequences and liability of an erroneous determination.

Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 65 (2000) (footnotes omitted) (citing *Pierce*, 487 U.S. at 559–63). Several circuit courts have applied *Pierce* when reviewing Tax Court proceedings. *E.g.*, *Huffman v. Comm'r*, 978 F.2d 1139, 1148 (9th Cir. 1992) ("Because of the fact-bound nature of the inquiry, a deferential abuse of discretion review of the Tax Court's finding of substantial justification is appropriate."); *Heasley v. Comm'r*, 967 F.2d 116, 120 (5th Cir. 1992); *William L. Comer Family Equity Pure Trust v. Comm'r*, 958 F.2d 136, 139 (6th Cir. 1992); *Cassuto v. Comm'r*, 936 F.2d 736, 740 (2d Cir. 1991).

68. *Huff*, 743 F.3d at 795.

69. *Id.* at 801 (citing *Appleton v. Comm'r (Appleton I)*, 135 T.C. 461, 466–67 (2010)).

1. The Tax Court Has Never Applied FRCP 24(a)(2)

The Tax Court in *Appleton I* explicitly stated that it “do[es] not decide herein whether [FRCP] 24(a)(2) applies” and that “[a] review of th[e Tax] Court’s jurisprudence reveals that the Court has never recognized intervention of a third party as a matter of right.”⁷⁰ Indeed, the Tax Court’s findings in *Appleton I* that the USVI did not satisfy the elements of FRCP 24(a)(2) allowed the Tax Court to sidestep the decision of whether FRCP 24(a)(2) applied in that case, if at all in Tax Court proceedings.⁷¹ The *Huff* court, having harbored no such reservations, held that the rule may be applied in the Tax Court.⁷²

Moreover, as stated above, the Tax Court has never applied FRCP 24(a)(2) in one of its proceedings. This choice makes clear why the Eleventh Circuit erred in choosing the de novo standard of review. As shown below, Congress has granted the Tax Court broad power to choose its own procedure.

2. The Tax Court Has a Statutorily Granted Power to Choose Its Own Procedures

Generally, I.R.C. § 7453 provides that “the proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure . . . as the Tax Court may prescribe.”⁷³ And in cases where there is no Tax Court Rule on point, Rule 1(b) grants the Tax Court the power to prescribe its own procedural rules “in any instance there is no applicable rule of procedure.”⁷⁴ Specifically, Rule 1(b) states that where no rule of procedures applies, “the Court or Judge before whom the matter is pending *may prescribe* the procedure, giving particular weight to the Federal Rules of Civil Procedure *to the extent that they are suitably adaptable* to govern the matter at hand.”⁷⁵ Taken together, I.R.C. § 7453 and Rule 1(b) grant the Tax Court the power to permit or deny intervention of right.

70. *Appleton I*, 135 T.C. at 466–67. The Tax Court has applied FRCP 24(a)(1) where “Section 6015(e)(4) confers on a nonelecting spouse an unconditional statutory right to intervene within the meaning of rule 24(a)(1).” *Christie v. Comm’r*, No. 24515-12S, 2014 WL 1243973, at *1 (T.C. Mar. 26, 2014); *Fain v. Comm’r*, 129 T.C. 89, 90 (2007).

71. *Appleton I*, 135 T.C. at 466 (“Because we find that movant has not satisfied the requirements of [FRCP] 24(a)(2), we need not and do not decide herein whether [FRCP] 24(a)(2) applies to proceedings in this Court.”).

72. *Huff*, 743 F.3d at 801.

73. I.R.C. § 7453 (2012).

74. TAX CT. R. 1(b).

75. *Id.* (emphasis added). The Eleventh Circuit discussed Rule 1(b) only once prior to *Huff*—in an unpublished opinion—and as in *Huff*, it did not decide to grant any deference pursuant to Rule 1(b) to the Tax Court when reviewing its application of the Civil Rule in that case. See *Langille v. Comm’r*, 447 F. App’x 130, 135 (11th Cir. 2011).

In reviewing the Tax Court's decision not to apply FRCP 24(a)(2), the *Huff* court did not explore the interaction of Tax Court Rule 1(b) and I.R.C. § 7453 with the Eleventh Circuit's general standard of review for a district court's denial of an FRCP 24(a)(2) motion.⁷⁶ Instead, *Huff* interpreted Rule 1(b) not as a limit on its standard of review but as a grant of discretion to the *appellate court* to apply a procedural rule that the Tax Court had never applied in any proceeding.⁷⁷

In stark contrast, the Fourth Circuit in *McHenry* struck squarely on the implications of Tax Court Rule 1(b) and I.R.C. § 7453 on the proper standard of review. The *McHenry* court stated that Rule 1(b) "grants the *Tax Court* broad discretion to borrow procedures from the Federal Rules of Civil Procedure."⁷⁸ Accordingly, a challenger would have to "demonstrate an abuse of discretion" and this would require showing that the Tax Court—in having never allowed a third party to intervene as a matter of right under FRCP 24(a)(2)—erred in its "own perception of its limited jurisdiction."⁷⁹ Regarding I.R.C. § 7453's impact, the Fourth Circuit—in further contrast to the *Huff* court—noted its lack of authority to impose FRCP 24(a)(2) in a proceeding where the Tax Court had failed to do so.⁸⁰

3. Under I.R.C. § 7482 the Abuse of Discretion Standard Is Proper for Reviewing Tax Court Procedural Decisions

No case discusses how I.R.C. § 7482 affects this standard of review analysis. I.R.C. § 7482 states that "[t]he United States Courts of Appeals . . . shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."⁸¹ Taking I.R.C. § 7482 at face value, the standards for reviewing Tax Court decisions

76. Instead, the court plainly stated "[w]e review a trial court's denial of intervention of right *de novo*" and then moved on to the merits of the case. *Huff*, 743 F.3d at 795.

77. *See id.* at 801.

78. *McHenry v. Comm'r*, 677 F.3d 214, 218 (2012) (emphasis added).

79. *Id.* at 226.

80. *See id.* ("[W]e would not, in any event, be authorized to mandate Tax Court procedure to govern intervention of right even if we thought it would be useful. That is left exclusively to the Tax Court." (citing I.R.C. § 7453)).

81. I.R.C. § 7482(a) (2012). The fact that I.R.C. § 7482 is labeled merely "Jurisdiction" does not narrow the circuit courts of appeals' review of Tax Court decisions. Lederman, *supra* note 3, at 1867 n.160 ("It is odd that subsection (a) [of § 7482] is merely labeled 'Jurisdiction,' given that subsection (a)(1) refers to the 'manner' and 'extent' of review, not just the exclusivity of appellate court jurisdiction. It appears to be a carryover from the 1926 statute, which included in the 'Jurisdiction' section both the grant of appellate jurisdiction and the power of the appellate courts to affirm or reverse if the Board's decision was not in accordance with the law.").

would be the same as those for reviewing decisions of district courts.⁸² However, courts have yet to discuss the effects of the discretion granted by Rule 1(b) and I.R.C. § 7453 on I.R.C. § 7482's general rule.

Given the discretion the Tax Court enjoys under § 7453, a de novo standard of review is not proper when reviewing a Tax Court's interpretation and application of a procedural rule. I.R.C. § 7453 states that the Tax Court "may prescribe" its own rules of practice and procedure in its proceedings.⁸³ Similarly, FRCP 24(b)(2) states that a court "may permit"⁸⁴ intervention in certain situations; based on this permissive language, an appellate court generally reviews a trial court's application of this rule for an abuse of discretion.⁸⁵ By analogy, an appellate court should similarly review the Tax Court's application of a procedural rule for an abuse of discretion based on I.R.C. § 7453's authorization that the Tax Court "may prescribe" its rules of procedure.

I.R.C. § 7482 further supports this analogy because its plain language requires appellate courts to review Tax Court decisions in the same manner as district court decisions.⁸⁶ Taking I.R.C. §§ 7482 and 7453 together, appellate courts should review the Tax Court's procedural rulings (made discretionary by I.R.C. § 7453) under an abuse of discretion standard of review, the same standard applied to discretionary district court decisions (as required by I.R.C. § 7482).⁸⁷ Accordingly, the *Huff* court applied an incorrect standard of review to the Tax Court's denial of the USVI's motion to intervene.

82. Indeed, the Seventh and Eleventh Circuits appear to have taken this approach and simply used the same standards of review for district court decisions when deciding Tax Court Rule 1(b) decisions. *See Wronke v. Comm'r*, 17 F. App'x 482, 485 (7th Cir. 2001) (utilizing the abuse of discretion standard when applying FRCP 60(b) to a Tax Court proceeding as the standard under which the Seventh Circuit reviews such FRCP 60(b) motions from district courts); *Huff*, 743 F.3d at 795.

83. I.R.C. § 7453 (emphasis added).

84. FED. R. CIV. P. 24(b)(2) (emphasis added).

85. In particular, the Eleventh Circuit reviews "a denial of permissive intervention for a clear abuse of discretion." *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008).

86. *See Kelley v. Comm'r*, 45 F.3d 348, 350 (9th Cir. 1995) (stating that the Ninth Circuit "review[s] decisions of the Tax Court on the same basis as decisions in civil bench trials in United States District Court. Thus, the Tax Court's . . . discretionary rulings are examined for an abuse of discretion" (citations omitted)).

87. *See Kalo v. Comm'r*, 149 F.3d 1183 (6th Cir. 1998) (stating that the U.S. Court of Appeals for the Sixth Circuit "review[s] the Tax Court's interpretation and application of its own procedural rules for an abuse of discretion"); *Comm'r v. Long's Estate*, 304 F.2d 136, 144 (9th Cir. 1962); *Comm'r v. Erie Forge Co.*, 167 F.2d 71, 76 (3d Cir. 1948) ("The Tax Court is authorized to determine whether its rules are complied with and where its decision of such questions is not shown to be clearly wrong it should not be disturbed."); *Comm'r v. Kerbaugh*, 74 F.2d 749, 750 (1st Cir. 1935) (per curiam) ("The Board of Tax Appeals is authorized to establish its own rules of procedure and to determine whether those rules are complied with. Where their decision of such a question is not shown to be clearly wrong, it should not be disturbed.").

B. *The Huff Court Should Not Have Allowed the Virgin Islands to Intervene*

Even assuming the de novo standard was appropriate, *Huff* erred in finding that the USVI had met FRCP 24(a)(2)'s requirements. In reversing the Tax Court's denial of intervention as of right, the court began its analysis by finding that the USVI had two legally protectable interests. First, the *Huff* court found that the USVI had an interest in the "disputed tax revenue" and that its exclusion from the Tax Court proceeding would "impact its claim" to this revenue.⁸⁸ In its analysis, the court determined the three possible scenarios that would result from an adverse ruling for the taxpayer, and therefore also for the USVI:

[1] the IRS *may ask* the Virgin Islands to transfer over the portion of taxes that should have been paid to the United States; [2] the Virgin Islands *may choose* to voluntarily refund the "overpaid" taxes as a matter of fairness; or [3] the Virgin Islands may be forced to accept that the Taxpayers paid taxes twice on the same income.⁸⁹

Yet, based on these scenarios, there is no real impact on the USVI's claim to the disputed tax revenue: the IRS cannot compel the USVI to transfer the taxes, and nothing requires the USVI to relinquish them, leaving only the final possibility of the USVI's guilty conscience from its citizens being taxed twice—a result of the taxpayer's own misapplication of the I.R.C.

The court also found that the USVI had a "sovereign interest" in the proceeding in "preserving the integrity of its tax system."⁹⁰ Indeed, the USVI views this case as "one battle in a long-running, multi-front war being waged by the Internal Revenue Service."⁹¹ However, as the Fourth Circuit in *McHenry* correctly observed, the USVI has other viable options:

No matter what the outcome of the tax deficiency case, the Virgin Islands will retain the same authority to administer its [tax laws], and any views it has on the IRS's interpretation of the U.S. Tax Code can easily be expressed in an amicus brief, which the Tax Court has indicated it will allow, or in some other forum more suited to such policy arguments.⁹²

88. *Huff v. Comm'r*, 743 F.3d 799–800 (2014).

89. *Id.* at 798 (emphasis added).

90. *Id.* at 799.

91. Brief for Appellant at 1, *Huff*, 743 F.3d 790 (Nos. 11-10608, 11-10617, 11-10618), 2011 WL 2782944.

92. *McHenry v. Comm'r*, 677 F.3d 214, 227 (2012).

The USVI wrongly seeks to wage this war in a limited deficiency proceeding and “[u]ndoubtedly, if allowed to intervene, the Virgin Islands would transform the deficiency case into some proceeding far larger, far more complex, and far more protracted.”⁹³

Finally, the court found that the USVI’s interests were not adequately represented by the original parties to the proceeding due to the “Taxpayers’ different interests and capabilities.”⁹⁴ Regarding their interests, while the court acknowledged that the taxpayers and the USVI have taken the same position for litigation, the court found that the “Taxpayers’ pecuniary interest is qualitatively different from the Virgin Islands’ sovereign interests in the administration of its tax system.”⁹⁵ Despite these purported differences of interest, the USVI should not be allowed to intervene in the proceeding because these interests are not the type of legally protectable interests required for intervention of right, as discussed above and also in *Appleton I* and *McHenry*.⁹⁶

Turning to capabilities, the *Huff* court reasoned that the USVI would be inadequately represented by the taxpayers because they lacked the “same institutional knowledge of the interrelationship between the United States and Virgin Islands tax systems.”⁹⁷ Assuming arguendo that the taxpayers lacked the indicated understanding, this knowledge is irrelevant to the disposition of the underlying case in which the USVI seeks to intervene. These rulings turn only on the proper application of provisions of the I.R.C., i.e., whether the statute of limitations applies under I.R.C. § 6501, and if not, whether the taxpayers were bona fide residents pursuant to I.R.C. § 932. Indeed, if the taxpayers prevail on either issue, the USVI also prevails and its tax system is thereby preserved. The court further reasoned that the taxpayers had different capabilities from the USVI because they lacked “access to the same information regarding the consequences of the IRS’s statute-of-limitations position.”⁹⁸ Yet, it is unclear what consequences the court had in mind. Since the taxpayers were represented by counsel in the litigation,⁹⁹ they certainly had access to the information and expertise

93. *Id.* The Tax Court reasoned that, were the USVI allowed to intervene, its participation “could result in trial complications as well as delay the resolution of the [statute of limitations] issue.” *Appleton v. Comm’r (Appleton I)*, 135 T.C. 461, 470 (2010). Through its participation in the proceeding, the USVI would “have the right to introduce documentary evidence, call its own witnesses, and cross-examine witnesses of the other parties.” *Id.*

94. *Huff*, 743 F.3d at 800.

95. *Id.*

96. *See supra* notes 31–32, 50 and accompanying text.

97. *Huff*, 743 F.3d at 800.

98. *Id.*

99. Petitioner Huff was represented by the international law firm of Sharp Partners P.A., which specializes in international tax planning and controversies. *See Huff v. Comm’r*, 138 T.C. 258, 259 (2012); SHARP PARTNERS P.A.: INTERNATIONAL TAX LAW, <http://www.sharptaxlaw.com> (last visited July 1, 2015).

needed to address the proper interpretation and application of I.R.C. §§ 6501 and 932.

CONCLUSION

Assuming that the *de novo* standard of review to the Tax Court's denial of the USVI's motion to intervene was proper, the *Huff* court erred in finding that the USVI had an interest in the proceeding, that this interest was impaired, and finally, that the interest would not be adequately represented by the taxpayer.

On the other hand, whether the Eleventh Circuit erred in applying the *de novo* review standard depends on the interplay of three provisions. I.R.C. § 7453 grants the Tax Court the power to prescribe its own procedure, and Tax Court Rule 1(b) grants the Tax Court the discretion to apply the Federal Rules of Civil Procedure. Furthermore, I.R.C. § 7482 mandates that the courts of appeals review tax court decisions in the same manner and to the same extent as district court decisions. Because appellate courts generally review discretionary decisions of district courts for an abuse of discretion, the *Huff* court erred in applying the *de novo* standard given the Tax Court's statutorily granted discretion to apply—or not apply—the Federal Rules of Civil Procedure. Going forward, appellate courts should review all procedural decisions made by the Tax Court for an abuse of the discretion based on I.R.C. §§ 7453, 7482, and Tax Court Rule 1(b).

